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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

DUAL DIAGNOSIS TREATMENT
CENTER, INC., a California corporation,
et al.,

Plaintiffs,

vs.

BLUE CROSS OF CALIFORNIA, dba
ANTHEM BLUE CROSS, et al.,

Defendants.

Case No. 8:15-cv-00736-DOC-RNB

**NOTICE OF MOTION AND
OMNIBUS MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Date: April 18, 2016

Time: 8:30 a.m.

Location: Courtroom 9D

Judge: Honorable David O. Carter

Complaint Filed: May 8, 2015

¹ Exhibit A, attached hereto, identifies the individual defendants that are referred to collectively herein as the "Anthem Defendants."

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 18, 2016, at 8:30 a.m., or as soon thereafter as this matter may be heard in Courtroom 9D of the above-captioned Court, located at 411 West Fourth Street, Santa Ana, California 92701, Defendants² will, and hereby do, move this Court for an order dismissing the First Amended Complaint (the “FAC”) filed by Plaintiffs Dual Diagnosis Treatment Center, Inc., *et al.* (collectively, “Plaintiffs”) in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the following grounds:

1. With respect to Plaintiffs’ First, Second and Third Counts under ERISA, Plaintiffs are not themselves beneficiaries within the meaning of ERISA and do not otherwise possess direct statutory standing to bring claims under ERISA directly. Instead, Plaintiffs’ rights under ERISA, if any, are purely derivative of their patients’ rights and are limited to those rights that were expressly and knowingly transferred pursuant to a valid assignment. As a result, Plaintiffs’ lack standing to assert their purported claims under ERISA on each of the following independent grounds:
 - The form attached as Exhibit A to the FAC (the “Form A Assignment”) is nothing more than mere direct-payment authorizations, which does not manifest any intent by Defendants’ members to assign, convey, or otherwise transfer to Plaintiffs their legal rights to plan benefits or the ability to bring claims under ERISA.
 - Even if construed as an assignment of benefits, as opposed to a mere direct-payment authorization, the Form A Assignment does not encompass the right to assert claims that seek the removal of ERISA plan fiduciaries (Count 2) or for equitable relief under ERISA (Count 3).
 - The form attached as Form B to the FAC (the “Form B Assignment”) is a

² Exhibit B, attached hereto, identifies the individual defendants that are referred to collectively herein as “Defendants” for purposes of this Motion and join in the filing of this Motion.

1 contract of adhesion that is signed as a condition of receiving treatment by
 2 individuals that suffer from addiction and mental health issues and, based on
 3 the allegations in the FAC, is procedurally and substantively unconscionable
 4 and, therefore, unenforceable as a matter of law.

- 5 • The Form B Assignment, by its terms, does not extend to claims that seek
 6 the removal of ERISA plan fiduciaries (Count 2).

7 2. Further, even if the Form A and Form B Assignments were determined by
 8 the Court to encompass Plaintiffs' claims under ERISA, Plaintiffs' ERISA claims would
 9 nevertheless fail as a matter of law for the following reasons:

- 10 • As to the many plans at issue that contain anti-assignment provisions, any
 11 purported assignment under those plans is void *ab initio* under well settled
 12 case law in the Ninth Circuit and, as a result, the anti-assignment provisions
 13 nullify Plaintiffs' purported "assignments" on which Plaintiffs' ERISA
 14 claims are predicated.
- 15 • Plaintiffs allege that the only action they took to apprise Defendants of their
 16 purported "assignments" was to check a box on the claim forms they
 17 submitted to some Defendants, which, as a matter of law, does not constitute
 18 timely notice of the terms and scope of the purported assignments at issue
 19 such that Defendants were obligated to render performance to Plaintiffs
 20 directly rather than Defendants' members.
- 21 • Plaintiffs failed to apprise Defendants of the terms and scope of the
 22 purported "assignments" in instances where the services at issue were billed
 23 and/or provided by Medical Concierge, Inc. ("Medlink"), as opposed to any
 24 of the named Plaintiffs in the action.
- 25 • Plaintiffs admit in their FAC that Defendants paid the applicable benefits to
 26 the ERISA plan participants or beneficiaries that received services from
 27 Plaintiffs, and Plaintiffs do not plead facts establishing that Defendants were
 28 duty-bound to pay Plaintiffs instead.

3. As to Plaintiffs' claim under California Business and Professions Code § 17200, Plaintiffs' Section 17200 claim fails as a matter of law, and should be dismissed with prejudice, on the grounds that it suffers from the same fatal defects as Plaintiffs' ERISA claims. Because Plaintiffs' claim under Section 17200 is premised on the same alleged "unlawful and unfair business practices" that form the basis of Plaintiffs' claims under ERISA, Plaintiffs' Section 17200 claim fails for the same reasons discussed above. Further, the FAC fails to identify any "borrowed" law or antitrust violation that can serve as a predicate for a Section 17200 claim. Finally, Plaintiffs' Section 17200 claim seeks the direct payment of plan benefits from Defendants pursuant to alleged assignments of plan benefits executed by Plaintiffs' patients. Because Plaintiffs' Section 17200 claim indisputably relates to the ERISA-governed benefit plans at issue, Plaintiffs' Section 17200 claim is preempted by ERISA's express preemption provision, 29 U.S.C. § 1144(a). To the extent that the Court finds that Plaintiffs stated a claim for relief under 29 U.S.C. § 1132(a)(1)(B), Plaintiffs' Section 17200 claim is also completely preempted by ERISA's civil enforcement provision.

4. To the extent that any of Plaintiffs' claims survive the instant Motion, the Court should strike Plaintiffs' demand for a jury trial. The Ninth Circuit has held that "in ERISA actions there is no independent constitutional or statutory right to a jury trial." *Nevill v. Shell Oil Co.*, 835 F.2d 209, 213 (9th Cir. 1987). Similarly, there is no right to a jury trial for Plaintiffs' claim for violations of California Business and Professions Code § 17200 because the only relief afforded under the statute is equitable. *Hodge v. Sup. Ct.*, 145 Cal.App.4th 278, 284-285 (2006). Because all of Plaintiffs' purported claims are brought under ERISA and Business and Professions Code § 17200, Plaintiffs' demand for a jury should be stricken from the FAC under Fed. R. Civ. P. 12(f).

Defendants' Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the supporting Addenda to the Omnibus Motion to Dismiss, the Declaration of Gregory Armknecht, the supporting additional declarations submitted by Defendants, the pleadings and records on file in this

1 action, and such additional authority and argument as may be presented at the hearing on
2 this Motion.

3 This Motion is made following the conference of counsel pursuant to Local Rule 7-
4 3, which took place on January 19, 2016 attended by Plaintiffs' counsel, Peter Stris and
5 Elizabeth Brannen, and Defendants' representative counsel, Eileen R. Ridley, William
6 Von Behren, Brian Boyle and Katherine M. Katchen.

7 DATED: January 25, 2015

FOLEY & LARDNER LLP

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Alan R. Ouellette

/s/ Eileen R. Ridley

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CROSS AND BLUE SHIELD, ANTHEM
INSURANCE COMPANIES, INC., dba
ANTHEM BLUE CROSS AND BLUE
SHIELD, COMMUNITY INSURANCE
COMPANY, dba ANTHEM BLUE CROSS
AND BLUE SHIELD, EMPIRE HEALTH
CHOICE ASSURANCE, INC., dba EMPIRE
BLUE CROSS AND BLUE SHIELD, ROCKY
MOUNTAIN HOSPITAL AND MEDICAL
SERVICE, INC., dba ANTHEM BLUE
CROSS AND BLUE SHIELD, ANTHEM
HEALTH PLANS OF VIRGINIA, INC.,
BLUE CROSS AND BLUE SHIELD OF
GEORGIA, INC., BLUE CROSS BLUE
SHIELD OF WISCONSIN, erroneously sued
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ACWA/JPIA EMPLOYEE BENEFITS
PROGRAM, BANK OF THE WEST
EMPLOYEE BENEFIT PLAN,
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WELFARE PLAN, CNS HEALTH AND
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EMPLOYEE BENEFIT PLAN, ERNST &
YOUNG MEDICAL PLAN, FERGUSON
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PLAN, GENTIVA HEALTH SERVICES
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CORPORATION HEALTH AND WELFARE
BENEFIT PLAN, KENTUCKY
CONSTRUCTION INDUSTRY TRUST,
LECROY HEALTH AND DISABILITY
BENEFIT PLAN, LIVE NATION
ENTERTAINMENT, INC. GROUP
BENEFITS PLAN, NORTHROP GRUMMAN
CORPORATION GROUP BENEFITS PLAN,
PEAK FINANCE COMPANY GROUP
HEALTH PLAN, PEPSICO EMPLOYEE
HEALTH CARE PROGRAM, SAGE
SOFTWARE INC. AND CO-SPONSORING
AFFILIATES HEALTH AND WELFARE
PLAN, SALLIE MAE EMPLOYEES
COMPREHENSIVE WELFARE BENEFITS
PLAN, SHEET METAL WORKERS LOCAL
NO. 40 HEALTH FUND, THE AEROSPACE
CORPORATION GROUP HOSPITAL-
MEDICAL PLAN, THE KROGER CO.
HEALTH & WELFARE BENEFIT PLAN,
THE LILLY EMPLOYEE WELFARE PLAN,
THE LINCOLN ELECTRIC COMPANY
WELFARE BENEFITS PLAN, THE STEAK
N SHAKE EMPLOYEE BENEFIT PLAN,
VERIZON NATIONAL PPO WEST, VIASAT
INC. EMPLOYEE BENEFIT PLAN and
XEROX CORPORATION WELFARE PLAN

DATED: January 25, 2015

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BENEFIT PLAN, CORRECTIONS
CORPORATION OF AMERICA SCA
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WAFERTECH LLC HEALTH & WELFARE
PLAN and EHEALTHINSURANCE
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4
5 DATED: January 25, 2015

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14 BLUE CROSS BLUE SHIELD OF
15 TENNESSEE, INC., BLUE CROSS AND
16 BLUE SHIELD OF FLORIDA, INC. d/b/a
17 FLORIDA BLUE, BLUE CROSS AND
18 BLUE SHIELD OF MASSACHUSETTS
19 HMO BLUE, INC., BLUE CROSS AND
20 BLUE SHIELD OF MASSACHUSETTS,
21 INC., BLUE CROSS AND BLUE SHIELD
22 OF NORTH CAROLINA, BLUE CROSS
23 AND BLUE SHIELD OF SOUTH
24 CAROLINA, BLUE CROSS OF
25 NORTHEASTERN PENNSYLVANIA, C.R.
26 BARD, INC. EMPLOYEE BENEFIT PLAN,
27 CALIFORNIA PHYSICIANS SERVICE d/b/a
28 BLUE SHIELD OF CALIFORNIA, CHICOS
FAS, INC. HEALTH & WELFARE BENEFIT
PLAN, COMMUNITY HEALTH SYSTEMS
HEALTH PLAN, COVANCE, INC. HEALTH
& WELFARE PLAN, DYCOM INDUSTRIES
HEALTH AND WELFARE PLAN,
EXCELLUS HEALTH PLAN, INC., F.N.B.
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BENEFIT PLAN, FASTRAC MARKETS
LLC EMPLOYEE WELFARE BENEFIT
PLAN, GKN EMPLOYEE WELFARE
BENEFIT PLAN, GENERAL NUTRITION
GROUP INSURANCE PLAN, GLOBYS,
INC. GROUP HEALTH PLAN, HAWAII
MEDICAL SERVICE ASSOCIATION d/b/a
BLUE CROSS BLUE SHIELD OF HAWAII,
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PLAN, HIGHMARK BCBS, INC.,

1 HIGHMARK BLUE CROSS BLUE SHIELD,
 2 HIGHMARK BLUE SHIELD, HIGHMARK,
 3 INC. d/b/a HIGHMARK BLUE SHIELD,
 4 HORIZON HEALTHCARE SERVICES, INC.
 5 d/b/a HORIZON BLUE CROSS BLUE
 6 SHIELD OF NEW JERSEY,
 7 INLANDBOATMENS UNION OF THE
 8 PACIFIC NATIONAL HEALTH BENEFIT
 9 TRUST, INTERRAIL SIGNALS, INC.
 10 WELFARE BENEFIT PLAN, JENNINGS
 11 AMERICAN LEGION HOSPITAL
 12 EMPLOYEE BENEFIT PLAN, LOUISIANA
 13 HEALTH SERVICE & INDEMNITY
 14 COMPANY BLUE CROSS AND BLUE
 15 SHIELD OF LOUISIANA, MACHINISTS
 16 HEALTH & WELFARE TRUST FUND,
 17 MARTIN MARIETTA MEDICAL PLAN,
 18 NATURES PATH FOODS, INC. WELFARE
 19 BENEFIT PLAN, NORTHERN
 20 CALIFORNIA SHEET METAL WORKERS,
 21 NOVARTIS CORPORATION WELFARE
 22 BENEFIT PLAN, OGLETREE, DEAKINS,
 23 NASH, SMOAK & STEWART, P.C. GROUP
 24 MEDICAL PLAN, ORASURE
 25 TECHNOLOGIES INC. HEALTH AND
 26 WELFARE PLAN, PEAK 10, INC.
 27 EMPLOYEE BENEFIT PLAN, PREMERA
 28 BLUE CROSS, PREMERA BLUE CROSS
 BLUE SHIELD OF ALASKA, PROFIT
 INSIGHT HOLDINGS LLC GROUP
 HEALTH PLAN, PUBLIX SUPER
 MARKETS, INC. GROUP HEALTH
 BENEFIT PLAN, RAYONIER, INC.
 WELFARE PLANS, REGENCE
 BLUECROSS BLUESHIELD OF OREGON,
 erroneously sued herein as REGENCE
 INSURANCE HOLDING CORPORATION;
 REGENCE BLUECROSS BLUESHIELD OF
 UTAH, erroneously sued herein as REGENCE
 INSURANCE HOLDING CORPORATION;
 REGENCE BLUESHIELD erroneously sued
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 HOLDING CORPORATION; SAS
 INSTITUTE INC. WELFARE BENEFITS
 PLAN, SCANA CORPORATION HEALTH
 & WELFARE PLAN, SEABRIGHT
 INSURANCE COMPANY GROUP HEALTH
 PLAN, SPOKANE TEACHERS CREDIT
 UNION EMPLOYEE MEDICAL & DENTAL
 PLAN, TUV AMERICA, INC. INSURANCE
 BENEFITS PLAN, THE MASTER
 BUILDERS ASSOCIATION HEALTH
 INSURANCE TRUST, UNITED STATES
 STEEL PLAN FOR ACTIVE EMPLOYEE
 INSURANCE BENEFITS, U.S. RENAL

CARE, INC., WELLMARK OF SOUTH
DAKOTA, INC. and WELLMARK, INC.

DATED: January 25, 2015

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CROSS AND BLUE SHIELD OF KANSAS
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HEALTH PLAN, PIONEER ENERGY
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1 BENEFIT PLAN and XEROX BUSINESS
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4 DATED: January 25, 2015

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22 DATED: January 25, 2015

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SERVICES, INC. AND SUBSIDIARIES
MEDICAL PLAN

1 DATED: January 25, 2015

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13 INSURANCE PLAN

14 DATED: January 25, 2015

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22 PLAN, TAC MANUFACTURING, INC.
23 EMPLOYEE WELFARE BENEFIT PLAN
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25 HEALTH & WELFARE PLAN

26 DATED: January 25, 2015

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2 DATED: January 25, 2015

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15 DATED: January 25, 2015

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21 HEALTH PLAN

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23 DATED: January 25, 2015

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27 HEALTH AND WELFARE BENEFITS PLAN
28 (formerly known and sued as Limited Brands,
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1 DATED: January 25, 2015

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9 DATED: January 25, 2015

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15 FAMILY MEDICAL CARE PLAN

16 DATED: January 25, 2015

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1 DATED: January 25, 2015

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8 DATED: January 25, 2015

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15 WELFARE PLAN

16 DATED: January 25, 2015

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25 SERVICES, LLC EMPLOYEE BENEFITS
26 PLAN
27
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1 DATED: January 25, 2015

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8 BENEFITS PLAN

9 DATED: January 25, 2015

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15 DATED: January 25, 2015

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20 MEDICAL CARE NORTH AMERICA
21 MEDICAL PLAN, erroneously sued as
22 NATIONAL MEDICAL CARE, INC. GROUP
23 MEDICAL, DENTAL, LIFE AND AD&D
24 PLAN
25
26
27
28

1 DATED: January 25, 2016

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7 FIRE INSURANCE COMPANY EMPLOYEE
8 MEDICAL AND DENTAL EXPENSE
9 BENEFITS PLAN

10 DATED: January 25, 2015

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16 CALANDRA, INC. MEDICAL PLAN, NHS
17 HUMAN SERVICES WELFARE PLAN and
18 SIERRA NEVADA BREWING CO.
19 WELFARE BENEFITS PLAN

20 DATED: January 25, 2015

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26 SMARTHEALTH MEDICAL PLAN
27
28

1 DATED: January 25, 2015

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7 /s/ Michael W. Sandner
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8 HOLDINGS, LLC EMPLOYEE BENEFIT
9 PLAN

10 DATED: January 25, 2015

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15 Attorneys for Defendant UFCW LOCAL 555-
16 EMPLOYERS HEALTH TRUST

17 DATED: January 25, 2015

**LAQUER, URBAN, CLIFFORD & HODGE
LLP**
Susan Graham Lovelace

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21 /s/ Susan Graham Lovelace
Susan Graham Lovelace
22 Attorneys for Defendant SOUTHERN
23 CALIFORNIA IBEW-NECA HEALTH
24 TRUST FUND
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1 DATED: January 25, 2015

DECHERT LLP
Timothy C. Blank

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5 Timothy C. Blank
6 Attorneys for Defendant ROCKET
7 SOFTWARE GROUP INSURANCE
8 BENEFIT PLAN

9 *Filer's Attestation: Pursuant to Local Rule 5-4.3.4(a)(2)(i), Eileen R. Ridley hereby*
10 *attests that concurrence in the filing of this document and its contents was obtained from*
11 *all signatories listed.*